

(5) If the ALJ grants the extension request, it must impose a new discovery deadline and, if necessary, reschedule the hearing date so that all discoveries end no later than 45 days before the hearing.

(d) *Motions to compel or for protective order.* (1) Each party is required to make a good faith effort to resolve or narrow any discovery dispute.

(2) A party may submit to the ALJ a motion to compel discovery that is permitted under this section or any ALJ order, and a party may submit a motion for a protective order regarding any discovery request to the ALJ.

(3) Any motion to compel or for protective order must include a self-sworn declaration describing the movant's efforts to resolve or narrow the discovery dispute. The declaration must also be included with any response to a motion to compel or for protective order.

(4) The ALJ must decide any motion in accordance with this section and any prior discovery ruling in the appeal.

(5) The ALJ must issue and mail to each party a discovery ruling that grants or denies the motion to compel or for protective order in whole or in part; if applicable, the discovery ruling must specifically identify any part of the disputed discovery request upheld and any part rejected, and impose any limits on discovery the ALJ finds necessary and appropriate.

(e) *Reviewability of discovery and disclosure rulings—*

(1) *General rule.* An ALJ discovery ruling, or an ALJ disclosure ruling such as one issued at a hearing is not subject to immediate review by the MAC. The ruling may be reviewed solely during the course of the MAC's review specified in § 405.1100, § 405.1102, § 405.1104, or § 405.1110, as applicable.

(2) *Exception.* To the extent a ruling authorizes discovery or disclosure of a matter for which an objection based on privilege, or other protection from disclosure such as case preparation, confidentiality, or undue burden, was made before the ALJ, the MAC may review that portion of the discovery or disclosure ruling immediately.

(i) Where CMS objects to a discovery ruling, the MAC must take review and the discovery ruling at issue is auto-

matically stayed pending the MAC's order.

(ii) Upon notice to the ALJ that a party intends to seek MAC review of the ruling, the ALJ must stay all proceedings affected by the ruling.

(iii) The ALJ determines the length of the stay under the circumstances of a given case, but in no event must the length of the stay be less than 15 days beginning after the day on which the ALJ received notice of the party or non-party's intent to seek MAC review.

(iv) Where CMS requests the MAC to take review of a discovery ruling or where the MAC grants a request, made by a party other than CMS, to review a discovery ruling, the ruling is stayed until the time the MAC issues a written decision that affirms, reverses, modifies, or remands the ALJ's ruling.

(v) With respect to a request from a party, other than CMS, for review of a discovery ruling, if the MAC does not grant review or take own motion review within the time allotted for the stay, the stay is lifted and the ruling stands.

(f) *Adjudication time frames.* If a party requests discovery from another party to the ALJ hearing, the ALJ adjudication time frame specified in § 405.1016 is tolled until the discovery dispute is resolved.

[70 FR 11472, Mar. 8, 2005, as amended at 70 FR 37704, June 30, 2005]

§ 405.1038 Deciding a case without a hearing before an ALJ.

(a) *Decision wholly favorable.* If the evidence in the hearing record supports a finding in favor of appellant(s) on every issue, the ALJ may issue a hearing decision without giving the parties prior notice and without holding a hearing. The notice of the decision informs the parties that they have the right to a hearing and a right to examine the evidence on which the decision is based.

(b) *Parties do not wish to appear.* (1) The ALJ may decide a case on the record and not conduct a hearing if—

(i) All the parties indicate in writing that they do not wish to appear before the ALJ at a hearing, including a hearing conducted by telephone or videoconferencing, if available; or

(ii) The appellant lives outside the United States and does not inform the ALJ that he or she wants to appear, and there are no other parties who wish to appear.

(2) When a hearing is not held, the decision of the ALJ must refer to the evidence in the record on which the decision was based.

§ 405.1040 Prehearing and posthearing conferences.

(a) The ALJ may decide on his or her own, or at the request of any party to the hearing, to hold a prehearing or posthearing conference to facilitate the hearing or the hearing decision.

(b) The ALJ informs the parties of the time, place, and purpose of the conference at least 7 calendar days before the conference date, unless a party indicates in writing that it does not wish to receive a written notice of the conference.

(c) At the conference, the ALJ may consider matters in addition to those stated in the notice of hearing, if the parties consent in writing. A record of the conference is made.

(d) The ALJ issues an order stating all agreements and actions resulting from the conference. If the parties do not object, the agreements and actions become part of the hearing record and are binding on all parties.

§ 405.1042 The administrative record.

(a) *Creating the record.* (1) The ALJ makes a complete record of the evidence, including the hearing proceedings, if any.

(2) The record will include marked as exhibits, the documents used in making the decision under review, including, but not limited to, claims, medical records, written statements, certificates, reports, affidavits, and any other evidence the ALJ admits. In the record, the ALJ must also discuss any evidence excluded under § 405.1028 and include a justification for excluding the evidence.

(3) A party may review the record at the hearing, or, if a hearing is not held, at any time before the ALJ's notice of decision is issued.

(4) If a request for review is filed or the case is escalated to the MAC, the complete record, including any record-

ing of the hearing, is forwarded to the MAC.

(5) A typed transcription of the hearing is prepared if a party seeks judicial review of the case in a Federal district court within the stated time period and all other jurisdictional criteria are met, unless, upon the Secretary's motion prior to the filing of an answer, the court remands the case.

(b) *Requesting and receiving copies of the record.* (1) A party may request and receive a copy of all or part of the record, including the exhibits list, documentary evidence, and a copy of the tape of the oral proceedings. The party may be asked to pay the costs of providing these items.

(2) If a party requests all or part of the record from the ALJ and an opportunity to comment on the record, the time beginning with the ALJ's receipt of the request through the expiration of the time granted for the party's response does not count toward the 90-day adjudication deadline.

[70 FR 11472, Mar. 8, 2005, as amended at 70 FR 37704, June 30, 2005]

§ 405.1044 Consolidated hearing before an ALJ.

(a) A consolidated hearing may be held if one or more of the issues to be considered at the hearing are the same issues that are involved in another request for hearing or hearings pending before the same ALJ.

(b) It is within the discretion of the ALJ to grant or deny an appellant's request for consolidation. In considering an appellant's request, the ALJ may consider factors such as whether the claims at issue may be more efficiently decided if the requests for hearing are combined. In considering the appellant's request for consolidation, the ALJ must take into account the adjudication deadlines for each case and may require an appellant to waive the adjudication deadline associated with one or more cases if consolidation otherwise prevents the ALJ from deciding all of the appeals at issue within their respective deadlines.

(c) The ALJ may also propose on his or her own motion to consolidate two